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IN THE

Supreme Court of the United States

COVENANT MEDIA OF SOUTH CAROLINA, LLC,

Petitioner,

v.

CITY OF NORTH CHARLESTON, SOUTH CAROLINA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF IN OPPOSITION

RANDAL MORRISON
SABINE & MORRISON
P.O. Box 531518
San Diego, CA 92153-1518
(619) 234-2864

SANDRA J. SENN
STEPHANIE MCDONALD
SENN, MCDONALD & LEINBACH
Three Wesley Drive
Charleston, SC 29407
(843) 556-4045

DERK VAN RAALTE
Counsel of Record
J. BRADY HAIR
TIM AMEY
CITY OF NORTH CHARLESTON
LEGAL DEPARTMENT
7741 Dorchester Road
Suite B
North Charleston, SC 29418
(843) 572-8700

Attorneys for Respondent

212644

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

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OVERVIEW OF THE CASE

This case is about a permit to erect one new billboard structure. The application was denied because the proposed sign seriously violated a rule requiring a 1000' separation between billboards. The denial was delayed because the application was misplaced.

Petitioner Covenant Media grieves the time lost waiting for a decision. The application sought permission to install a new billboard structure on which outdoor advertising messages might be posted *after* installation was complete. Covenant's claim of "response delay" damages arose from the fact that a counter clerk apparently lost the application. This claim was rejected — in both its "as applied" and "facial" forms — by the Fourth Circuit. The "as applied" challenge was rejected because a merely negligent error is not compensable under 42 U.S.C. § 1983. Covenant does not seek this Court's review of that ruling.

The Fourth Circuit rejected the facial challenge because the relevant provision of the sign ordinance was content neutral, and thus, under *Thomas v. Chicago Park District*, 534 U.S. 316, 122 S. Ct. 775 (2002), the sign ordinance was not constitutionally required to explicitly state a "time limit" for decision. It is only this latter ruling with which Covenant now takes exception, and on which it seeks this Court's review.

Despite Covenant's mistaken framing of the issue, there is no "prior restraint on speech" in this case. The relevant aspects of the City's sign ordinance dealt only with location and safety rules for new physical

structures, and ignored all message content. The distinction between installation of a new structure and later placement of advertisements thereon is crucial. The City's old sign ordinance — in effect when the application was submitted — required billboard companies wishing to erect new sign structures to apply for, and be granted, a permit. In contrast, persons wishing to "post a message" on the display face of an existing billboard structure could do so freely, without any form of prior approval from the City. Fourth Circuit Joint Appendix ("JA") p. 206, para. 6. Thus, the permit about which Covenant Media complains was triggered exclusively by its desire to undertake construction activity. Covenant's Petition glosses over this critical difference.

The Petition opens the Overview with the assertion that "Covenant Media submitted an application for permission to *post* one advertising sign. . . ." The erection of a new billboard structure cannot properly be called "posting a sign." That phrase, constantly misused by billboard companies, is appropriate only for "hanging vinyl" on the display face of an existing billboard, or to small, hand-painted signs on which the message is placed before the sign is installed. As a result of Covenant's misleading phrasing, great care must be taken to maintain focus on the true nature of the controversy.

FACTUAL BACKGROUND

On December 1, 2004, Petitioner Covenant Media of South Carolina submitted to the City of North Charleston, South Carolina an application to install one new billboard structure. JA p. 203, para.2; JA p. 154, para. 10. Counter staff at the City apparently misplaced the application. Petition Appendix ("PA") p. 29a. In the ensuing six months, Covenant never contacted the City to ask about the status of its application. PA p. 5a. Instead, Covenant's lawsuit, filed "out of the blue" in May of 2005, was a complete surprise to the City. PA p. 29a. Even after the suit was filed, Covenant took nearly six more months — until September 21, 2005 — to provide the City with a copy of the missing application. PA p. 29a. Once the application was resubmitted, the City responded in approximately three weeks. PA p. 29a.

The new sign structure was proposed to be located less than 800 feet from a pre-existing billboard structure. PA p. 48a. Since the sign ordinance required at least 1000' separation between billboards — a content neutral, narrow, objective standard if ever there was one — the City had no choice but to deny the application. It did so. PA p. 8a-9a.

Although the old sign ordinance did not contain an express time limit for decision on a permit application, PA p. 5a, the City's long-established administrative practice was to provide responses to permit applications within thirty days. JA p. 207, para 11. In addition to the administrative practice, the old sign ordinance explicitly required the Zoning Administrator to provide a response, and explicitly stated that such response was

subject to internal appeal. JA p. 47, Section 7-1 (zoning administrator "shall issue permits where such applications are in accord with the provisions of this ordinance. . . ."); see also JA p. 48, Section 7-2 (permit denials must be in writing), and JA p. 205 (4). Thus, Covenant's assertion that under the old ordinance "the City was never required to pass judgment on a sign application," Petition at 3, is plainly wrong.

On October 13, 2005, the City adopted a new sign code that, among other things, included express time limits for response and imposed a complete ban on all new billboards. JA pp. 5a-7a.

On July 12, 2006 the District Court granted summary judgment to the City, based in part on its determination that Covenant lacked standing. PA p. 38a. The District Court recognized that, whatever constitutional problems might have existed in the prior ordinance, Covenant still could not have built its proposed structure due to the clear violation of the 1000' spacing requirement. PA p. 50a.

The Fourth Circuit affirmed the District Court's result, albeit in part on different reasoning. PA p. 13a, *Covenant Media v. North Charleston*, 493 F.3d 421 (4th Cir. 2007). The Fourth Circuit concluded that Covenant had standing to present a claim arising from the time the City took to respond to the application. *Id.* The Fourth Circuit therefore considered on the merits Covenant's facial attack, which asserted that the ordinance's lack of a specified response time was a *per se* violation of the procedural safeguard rule of *Freedman v. Maryland*, 380 U.S. 51, 58, 85 S. Ct. 734 (1965). PA p. 28a.

As to the as applied argument, the Fourth Circuit concluded that Covenant could not recover damages for a delay based on mere negligence. Thus, the damage claim was not cognizable under 42 U.S.C. § 1983. PA pp. 30a-31a. However, the Fourth Circuit did state that any *intentional* unreasonable delay is actionable. PA pp. 13a, 31a-32a.

As to the facial argument, the Fourth Circuit ruled that the lack of a specified response time in the City's content neutral ordinance was not a *per se* constitutional deprivation because, under *Thomas v. Chicago Park District*, 534 U.S. 316, 320, 122 S. Ct. 775 (2002), the *Freedman* time limit for decision was not constitutionally required. PA p. 28a.

Covenant's Petition does not seek this Court's review of the Fourth Circuit's holding that the relevant portion of the City's ordinance was content neutral. PA p. 22a-23a. Nor does it assert unconstitutionality of the 1000' separation rule. Instead, it claims that the constitution requires an explicit time limit for decision on a permit to install a new physical device, even when the permit process does not consider potential messages.

REASONS FOR DENYING THE PETITION

The Petition does not present a case worthy of this Court's full consideration. This Court has not established a single rule for all factual contexts raising free speech issues. *See Metromedia v. San Diego*, 453 U.S. 490, 501, 101 S. Ct. 2882 (1981). Thus, conflating lines of First Amendment precedent is about as useful as bringing a baseball bat to a soccer match. Unfortunately, Petitioner has done precisely that.

There are a number of reasons, each independently sufficient, why the Petition should be denied. *First*, this case does not truly present a question of prior restraint on speech. *Second*, there is no significant split between the circuits on the issues present in this case. When structural, location and safety rules (the subject of this case) are separated from prior restraints on protected speech and expressive conduct, there is remarkable consistency in the lower court decisions. *Third*, Covenant is incorrect when it asserts that *Thomas* is limited exclusively to public forum cases. *Fourth*, Covenant's description of the Fourth Circuit's ruling, laced with hyperbole, suggests non-existent horrors. The Fourth Circuit has not announced a rule that cities may decide with impunity "never to respond" to speech-related permit requests. Thus, there is no grave error in need of correction. *Fifth* and finally, on its facts, this case would be a poor one with which to revisit *Thomas*, even if this Court were so inclined.

I. THERE IS NO PRIOR RESTRAINT ON SPEECH OR EXPRESSIVE CONDUCT IN THIS CASE

Contrary to Covenant's assertion, the billboard permit at issue in this case simply did not involve "*speech activity* subject to governmental approval." Petition at p. 6 and pp. 10-11; italic added. The City's permit requirement was triggered by Petitioner's proposal to install a new sign structure. There is no expressive conduct in that construction project.

The determination of whether a challenged regulation is directed at *speech* — in the constitutional sense — is a threshold issue in any free speech analysis. Regulations not directed at speech are constitutional even when they have an incidental effect on speech. *Erie v. Pap's A.M.*, 529 U.S. 277, 294-295, 120 S. Ct. 1382 (2000). Conversely, regulation based on message content or category is subject to strict scrutiny. *Burson v. Freeman*, 504 U.S. 191, 112 S. Ct. 1846 (1992), *Police Dept. of Chicago v. Mosley*, 408 U.S. 92, 92 S. Ct. 2886 (1972). Thus, a threshold inquiry in any free speech case is to determine whether the relevant provision directly regulates protected speech and / or expressive conduct. Here the permit did not.

Expressive conduct, in the context of new billboards, begins only after the physical structure is installed. Communication begins only when vinyl sheets, printed with communicative images, are attached to the display face of an existing billboard structure. Even then, the speaker is the sign company's rent-paying advertising client, *not* the sign company.

As the Fourth Circuit noted in its decision, "Similarly, the Sign Ordinance was adopted to regulate land use, not to stymie any particular message. And North Charleston's interests in regulating signs were completely unrelated to the messages displayed. . . ." *Covenant Media, supra*, 493 F.3d at 433, 434. Other cases of similar tenor: *Graff v. City of Chicago*, 9 F.3d 1309 (7th Cir. 1993, *en banc*; *cert denied*, 511 U.S. 1085 (1994)) ("The building of a newsstand is simply not a form of constitutionally protected expression. . . . Requiring a permit for the structure is not a prior restraint on speech") opinion of Manion, 9 F.3d at 1314; (*Graff* is cited in *Thomas, supra*, 534 U.S. at 326); *Eller Media Co. v. City of Tucson*, 198 Ariz. 127, 7 P.3d 136, 139 (AZ App. 2000) (dispute over a rule regarding where a billboard light source could be placed; since the rule did not affect the ad message, it *did not affect any aspect of communicative speech*, and did not burden any fundamental right); *Asselin v. Town of Conway*, 137 N.H. 368, 373, 628 A.2d 247, 251 (NH 1993) (prohibition on internally lighted signs did not impair freedom of expression).

Under both the prior and new sign ordinances, the City had no permitting system for "*actual content*," *i.e.*, individual messages to be displayed on existing billboards. *City of Lakewood v. Plain Dealer Pub. Co.*, 486 U.S. 750, 759-760, 108 S. Ct. 2138 (1988). Nor did it regulate classes of speech which could be displayed on pre-existing billboards, as was the case in *Metromedia, supra*, 453 U.S. at 512-514 (favoring of commercial messages over non-commercial).

This Court has created a test for deciding whether particular conduct possesses sufficient communicative elements to bring the First Amendment into play. That test asks whether "[a]n intent to convey a particularized message was present, and [whether] the likelihood was great that the message would be understood by those who viewed it." *Texas v. Johnson*, 491 U.S. 397, 403-404, 109 S. Ct. 2533 (1989), *Spence v. State of Washington*, 418 U.S. 405, 94 S. Ct. 2727 (1974).

There is nothing in the process of installing a new billboard that satisfies the "expressive conduct" test of *Texas v. Johnson*. Billboards are huge, multi-ton steel structures. *Horizon Outdoor v. City of Industry*, 2003 WL 24135456, *1. In addition to sign permits, they are typically subject to electrical and building permits, *Virtual Media Group v. San Matteo*, 66 Fed.Appx. 129 (ND CA 2003). Billboards are manufactured in special steel fabrication plants, transported to the site, and then installed by a construction crew using heavy equipment. For descriptions of the installation process, and physical injuries that sometimes occur during it, see: *Trinity Outdoor v. Phoenix Structures*, 2005 WL 2253902 (ED TN 2005), and *Electric Service Co. of Montgomery, Inc. v. Dyess*, 565 So.2d 244 (AL 1990). When installing the structures, the construction workers do not intend to express any particular thought or message; they are only doing their job. Observant passers-by would never think that the installers are trying to communicate any particular message. The billboard installation process clearly fails the *Texas v. Johnson* test.

Another factor shows that installation of a new billboard is not communicative. Billboard companies are in the business of facilitating the speech of others — their advertising customers. This Court has rejected the theory that facilitating the speech of others is in itself a communicative activity. In *PruneYard Shopping Center v. Robins*, 447 U.S. 74, 88, 100 S. Ct. 2035 (1980), this Court rejected the idea that the views of persons gathering petition signatures at a shopping mall would be attributed to the owners of the mall. Similarly, just last year the Court held that accommodating military recruiters on law school campuses did not mean that the schools were being forced to endorse the military message. *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*, 547 U.S. 47, 64, 126 S. Ct. 1297 (2006). Based on these precedents it is clear that billboard companies are *not* engaging in free speech when they display the messages of their customers. This is especially true when the billboards do not exist and the advertisers are unknown.

Because there is no speech or expressive conduct in the installation of a new billboard, and the permit system regulated only installation of new billboards, the City's permit scheme did not operate as a prior restraint on free speech or expressive conduct. Accordingly, Petitioner is not entitled to damages, or even declaratory relief, stemming from procedural rules announced in *Freedman* and *FW/PBS v. Dallas*, 493 U.S. 215, 110 S. Ct. 596 (1990).

II. THERE IS NO SIGNIFICANT SPLIT BETWEEN THE FOURTH CIRCUIT AND OTHER COURTS

Petitioner suggests a significant split between the Fourth Circuit and other courts. No such split exists. The Petition repeatedly conflates distinct lines of cases in at least two regards: (a) Petitioner erroneously presents "core speech" cases in support of its demand for procedural safeguards in this "construction project" context; and (b) Petitioner claims a circuit split regarding *Thomas* and "decision time limit" requirement. In each instance the claimed disparity between the positions disappears when the cases are analyzed in their applicable factual contexts.

a. Petitioner's "procedural safeguard" cases are not apropos regarding the non-communicative "construction" activity that triggered the North Charleston permit requirement.

The cases cited by Petitioner as support for *Freedman* safeguards come with factual settings that distance them from the narrow issue present in this case. When Petitioner's cases involving communicative conduct by live human beings and / or individual media creations are separated from the cases involving physical structures, the Fourth Circuit's ruling in this case is not at odds with prior precedent, or sister circuit precedent. Put another way, the cases offered by Petitioner as examples of circuits demanding a decisional time limit for content-neutral permitting systems do not turn on questions about physical structures, as presented in this case.

Petitioner's cited cases can readily be grouped in this fashion. The cases demanding a time limit for decision all involved either live human beings engaged in some expressive activity, or individual review of *specific* media creations (books, photographs or films), that were expressive in some way. *Freedman v. Maryland*, 380 U.S. 51, 85 S. Ct. 734 (1965) (censorship board reviewed individual films in advance of public exhibition); *Dombrowski v. Pfister*, 380 U.S. 479, 85 S. Ct. 1116 (1965) (law criminalizing political activity and propaganda); *Teitel Film v. Cusack*, 390 U.S. 139, 88 S. Ct. 754 (1968) (censorship board review of individual films); *Carroll v. President and Comm'rs of Princess Anne*, 393 U.S. 175, 89 S. Ct. 347 (1968) (injunction prohibiting political rally by "white supremacist" group); *Shuttlesworth v. Birmingham*, 394 U.S. 147, 89 S. Ct. 935 (1969) (law criminalizing participation in parade without a permit); *Blount v. Rizzi*, 400 U.S. 410, 91 S. Ct. 423 (1971) (placing allegedly obscene materials in the mail); *United States v. Thirty Seven Photographs*, 402 U.S. 363, 91 S. Ct. 1400 (1971) (seizure by Customs agents of allegedly obscene photographs); *Southeastern Promotions v. Conrad*, 420 U.S. 546, 95 S. Ct. 1239 (1975) (denial of use of municipal auditorium for a specific, live stage show); *McKinney v. Alabama*, 424 U.S. 669, 96 S. Ct. 1189 (1976) (selling of obscene materials); *National Socialist Party v. Skokie*, 432 U.S. 43, 97 S. Ct. 2205 (1977) (injunction against persons wearing swastikas); *Vance v. Universal Amusement*, 445 U.S. 308, 100 S. Ct. 1156 (1980) (prior review of individual films); *MIC v. Bedford*, 463 U.S. 1341, 104 S. Ct. 17 (1983) (injunction forbidding exhibition of two specific films); *Riley v. National Federation of the Blind*, 487 U.S. 781, 108 S. Ct. 2267 (1988) (solicitation of funds for charitable purposes);

FW/PBS v. Dallas, 493 U.S. 215 (1990) (operation of sexually oriented business). None of these cases involved permit systems for construction or erection of physical structures. When grouped in this fashion it becomes clear that the Fourth Circuit's *Covenant Media* opinion is not at odds with Petitioner's cited cases.

Although *City of Lakewood v. Plain Dealer Pub. Co.*, 486 U.S. 750 (1988) (not mentioned in the Petition) involved physical devices — news racks — this Court was careful to point out the unusual factors which made it a free speech / press freedom case: even after the city had given permission for installation of the news rack, the newspaper still had to apply annually for news rack licenses. Though this was not as threatening as a classical prior restraint on "*actual content*," it was sufficiently threatening to invite judicial concern. 486 U.S. 759-760.

b. Petitioner is also mistaken in suggesting its cited cases demonstrate a circuit split with respect to *Thomas* and require procedural safeguards for content-neutral time, place, and manner restrictions.

Covenant chases mirages when claiming the existence of a circuit split with regard to *Thomas* and the time limits for decision issue. The First, Fourth, Ninth, and Eleventh Circuits generally interpret *Thomas* to allow flexibility in terms of whether a content neutral time, place, and manner regulation must contain an express time limit for administrative decisions. In fact, all four of the cases cited by Covenant as evidence of a circuit split appear on close examination to be either consistent with the Fourth Circuit's approach, or distinguishable on the facts.

Covenant cites *Encore Video, Inc. v. City of San Antonio*, 330 F.3d 288, 296 (5th Cir. 2003), as both evidence of a circuit split and as a case expressly interpreting *Thomas* as applicable only to public forum cases. It is neither.

This court has long held that each medium of expression must be evaluated according to its particular characteristics. *Metromedia, supra*, 453 U.S. at 501 ("Each method of communicating ideas is 'a law unto itself' and that law must reflect the 'differing natures, values, abuses and dangers' of each method. We deal here with the law of billboards.") This truism dispels Petitioner's ability to rely on *Encore Video* in support of its argument here.

Encore Video was an adult business case, not a billboard case. Thus, the Fifth Circuit's decision to follow *FW/PBS* (as opposed to *Thomas*) is hardly surprising, since *FW/PBS* provides specific guidance in the context of regulation of adult businesses. The Fifth Circuit specifically pointed out this factor: "Like *FW/PBS* and *unlike Thomas* — which addressed a demonstration permit system for public parks — *this case addresses a licensing scheme for adult businesses.*" *Encore Video*, 330 F.3d at 296, n. 12 (emphasis added.) While the Fifth Circuit did say that "[t]he present case does not concern 'regulation of the use of a public forum'" as in *Thomas*, it stopped short of actually ruling that *Thomas only* applied to public forum cases. Read carefully, it simply distinguishes *Thomas* in the course of determining that *FW/PBS* continues to set the standard in the context of sexually oriented businesses.

Covenant's cited Seventh Circuit case, *Southworth v. Board of Regents*, 307 F.3d 566 (7th Cir. 2002), also does not evidence the split Covenant seeks to demonstrate. It is not a sign case; it does involve installation of new structures. It concerns use of mandatory student activity fees to fund controversial student groups. Thus, the distinction between medium and message — crucial in this case — is not present in *Southworth*.

The analysis in *Southworth* does not speak on the critical issue of whether time limits for decision must be explicitly stated in an ordinance that operates as a content neutral, time, place, and manner regulation; indeed, decisional time limits were not even an issue. The Seventh Circuit repeatedly characterized its situation, and the authorities upon which it relied, as "unbridled discretion" cases. *Id.* at 574.

The *Southworth* court reasoned that standardless decision making invited content censorship in a way that was difficult to police after the fact. As a result, the presence or absence of narrow, objective standards was a key to determining whether the scheme before it was content neutral. *Id.* at 577.

The *Southworth* court analyzed Thomas only on the question of what constituted "unbridled discretion" sufficient to preclude a finding of content-neutrality, 307 F.3d at 589, and viewed time limit standards as one factor to consider. Under the logic of *Southworth*, the absence of time limits *along with other types of standards* might cause a court to conclude that an ordinance is content based. If that inquiry yields "yes, it is content-based," then the relaxed standard under *Thomas* would be unavailable, since it is reserved only for content-neutral ordinance reviews.

Southworth does not say that *Freedman* time limits must be present in order to uphold a time, place, and manner restriction that has *already passed* the test of being content neutral. That distinction, and the structure / image distinction, set *Southworth* apart from this case.

The Fourth Circuit expressly found the relevant portion of the North Charleston ordinance to be content neutral. PA pp. 22a-23a. Covenant does not seek review of that ruling. Thus, *Southworth* is completely silent on the question presented by Covenant's Petition. Read in this manner, it does not present a conflict with the positions of the First, Fourth, Ninth, and Eleventh Circuits as Covenant asserts.

Riel v. Bradford, 485 F.3d 736 (3d Cir. 2007), is easily distinguished. The case concerned hand-painted, temporary, political protest signs. *Id.* at 740. Unlike billboards, such signs are typically one-use devices; the message is painted on before the sign — usually a sheet of plywood — is installed or displayed. In contrast, the billboards at issue here are large permanent structures, usually made of heavy-duty steel, which must be installed before the decades-long chain of periodically changing messages can begin.[1] Thus, the distinction between medium and message — crucial to this case — did not apply in *Riel*. Furthermore, the question in *Riel* was not *whether* a time limit for decision is constitutionally required, but rather, whether the explicit limit chosen — 30 days — was *reasonable*. *Riel*, 485 F.3d at 756. *Riel* did not address the issue raised by the Petition, and therefore is irrelevant.

1. *Metromedia*, *supra*, 453 U.S. at 511 ("[T]he city may believe that offsite advertising, with its periodically changing content, presents a more acute problem than does onsite advertising.")

Like *Riel*, *Lusk v. Village of Cold Spring*, 475 F.3d 480 (2d Cir. 2007) was a case involving one-use, hand-painted political protest signs. "In June 2004, Lusk began placing signs, which appear from pictures of them included in the record to have been made by applying spray paint to large pieces of plywood, on or leaning against his front porch. The signs conveyed Lusk's protest against a real estate development . . . ." *Id.* at 481-82. Thus, once again, the message vs. medium distinction, essential to this case, could not be made. Given the factual setting, and the urgency of the public hearing which Mr. Lusk was encouraging his neighbors to attend, it is not surprising that the court found unconstitutional the time-consuming procedure applicable to permits for temporary political signs.

Furthermore, *Lusk* actually reflects the Fourth Circuit's interpretation of *Thomas*, rather than taking exception to it. The *Lusk* court expressly recognized that "[i]n *Thomas*, the Court did indeed hold that the *Freedman* requirements for constitutional prior restraints . . . did not apply to content-neutral regulations." *Id.* at 492, n. 14. That is exactly what the First, Fourth, Ninth and Eleventh Circuits say on the same point.

It is also odd that Covenant cites *Lusk*, since it is not a *Thomas*-based case at all. *Lusk* specifically found that the Cold Spring ordinance fell under *City of Ladue v. Gilleo*, 512 U.S. 43, 114 S. Ct. 2083 (1994). *Lusk* , 475 F.3d at 490-92. It described *Ladue* as applying to the narrow situation in which the regulation barred an "entire medium" and hence constituted an "impermissibly broad ban on speech." *Id.* at 490-92;

see also Ladue, 512 U.S. at 55 (the court has "particular concern with laws that foreclose an entire medium of expression.") The *Lusk* court believed this factor took the Cold Spring ordinance out of the reach of the *Thomas* time, place, manner analysis and placed it into the *Ladue* line. 475 F.3d at 490-491. The court went so far as to signal readers that it was not confronting a *Thomas* or *FW/PBS* case at all. *Lusk*, 475 F.3d at 492, n. 14, stating: "[b]ut here, *even if these [Freedman] factors were apposite* under a *City of Ladue* analysis . . .", thus implying that they are not actually relevant under *Ladue*.) (emphasis added) Rather than demonstrating a conflict, *Lusk* suggests that the Fifth Circuit is harmonious with the First, Fourth, Ninth, and Eleventh circuits.

Petitioner fails to cite to any case involving permits for new billboards which holds that a specific, explicit, short time limit on permit decisions is constitutionally required when the sign ordinance operates in a content-neutral manner, or applies only to structural, location, and safety issues, as is the undisputed and decisive fact in this case. The cases which have considered the decision time limit issue in the context of new billboards permits have all rejected Covenant's position.

The earliest post-*Thomas* case to analyze the decisional time limit issue in the specific factual context of this case — permits for new billboards — is *Granite State Outdoor Advertising v. City of St. Petersburg*, 348 F.3d 1278 (11th Cir. 2003), *rehearing and hearing en banc denied*, 90 Fed.Appx. 390 (Table), *cert. denied*, 541 U.S. 1086 (2004). The District Court had ruled that the time limit was constitutionally required, but the Eleventh

Circuit, after carefully analyzing *Freedman* and *FW/PBS*, found the issue controlled by *Thomas*, and reversed. It held:

> We realize City officials could potentially delay the processing of certain permit applications and thereby arbitrarily suppress disfavored speech. We will not, however, address hypothetical constitutional violations in the abstract. As the Supreme Court noted in *Thomas*, we believe 'abuse must be dealt with if and when a pattern of unlawful favoritism appears, rather than by insisting upon a degree of rigidity that is found in few legal arrangements.' *Id.* [534 U.S.] at 325. Furthermore, we are reluctant to invalidate an entire legitimately-enacted ordinance absent more of a showing it is as problematic as Granite claims. . . . [W]e reverse on this point and hold that the lack of time limits is constitutionally acceptable.

St. Petersburg, 348 F.3d at 1282.

The Eleventh Circuit reiterated this point in *Granite State Outdoor v. Clearwater*, 351 F.3d 1112 (11th Cir. 2003), *rehearing and hearing en banc denied*, 97 Fed.Appx. 908 (2004), *cert. denied*, 543 U.S. 813 (2004), stating:

> The [*Lakewood v. Plain Dealer*, 486 U.S. 750 (1988)] majority noted, however, that "even if judicial review were relatively speedy, such review cannot substitute for concrete

> standards to guide the decision-maker's discretion." *Id.*, 108 S. Ct. at 2151. Thus, time limits are required when their lack could result in censorship of certain viewpoints or ideas, see, *e.g.*, *Freedman v. Maryland*, . . . but are not categorically required when the permitting scheme is content-neutral.

Clearwater, 351 F.3d at 1119.

District court decisions involving permits for new billboards are consistently in accord. *Covenant Media v. City of Huntington Park*, 377 F.Supp.2d 828, fn 37 (CD CA 2005); *Advantage Advertising, L.L.C. v. City of Pelham, Al.*, 2004 WL 3362497 *6, *7 (ND AL 2004); *Advantage Advertising, LLC v. City of Hoover, Al.*, 200 Fed.Appx. 831, 834 (11th Cir. 2006); *Lockridge v. City of Oldsmar, Fl.*, 475 F.Supp.2d 1240, 1255 (MD FL 2007); *RSWW v. City of Keego Harbor*, 2006 WL 1155228 *4 (ED MI 2006); *Norton Outdoor Advertising. v. Pierce Township*, 2007 WL 1577747 *7 (SD OH 2007).

In summary: There is no split between the circuits within the line of cases concerning permits for new billboards. All reported decisions hold that if the applicable rules are content-neutral, then there is no constitutional requirement for a time limit on permit decisions.

III. *THOMAS* IS NOT LIMITED TO PUBLIC FORUM CASES

Covenant makes too much of too little when it suggests that *Thomas* applies only in public forum cases. Ironically, the Petition itself cites cases at odds with Covenant's suggestion that a different analysis is required depending on the ownership of real property. For instance, in *Riel, supra*, the court expressly rejected the plaintiff's "attempt to create a split between those [Supreme Court sign cases] involving bans on private and public property." 485 F.3d at 746-47. Similarly, the court in *Southworth, supra*, rejected the university's "argument that the constitutional standards set forth in permit and licensing cases involving access to a physical forum, such as a park or city street, do not apply to a metaphysical forum of money. . . ." 307 F.3d at 580. Finally, *Lusk, supra*, does not definitively support Covenant's position. Read carefully, *Lusk* only tells readers that *Thomas* did not apply to the *Ladue* line of cases involving a complete ban on an entire medium. Thus, any attempt by Petitioner to distinguish *Thomas* from *Covenant Media* on public forum grounds would not find bedrock support even in the cases it cited.

IV. PETITIONER MISCONSTRUES THE FOURTH CIRCUIT'S HOLDING

Covenant overstates the Fourth Circuit's holding when it claims that under the *North Charleston* ruling "permits for speech activity can be held indefinitely so long as the regulation is not based on content. . . ." Petition at p. 5. The Fourth Circuit did not so hold.

To the contrary, the Fourth Circuit's analysis specifically demonstrates that cities can be liable for damages associated with delays in responding to applications. PA pp. 13a, 31a-32a. If Covenant had made any effort to inquire with the City, and the City still refused to timely respond, "such refusal may have established that the City intentionally refused to act . . . or was deliberately indifferent to the consequence of having a Sign Regulation that lacked procedural safeguards." *Id.*

Notably, though, Covenant never made any such attempt to inquire with the City. As a result, its claim of constitutional infringement was based solely on the unintentional, negligent loss of a document by a counter clerk. The Fourth Circuit was correct in recognizing that such negligence is not, without more, enough to show a violation of constitutional rights.

> [A] local government may not be sued under § 1983 for an injury inflicted solely by its employees or agents. Instead, it is when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under § 1983.

Monell v. Dept. of Social Services, 436 U.S. 658, 694-695, 98 S. Ct. 2018 (1978). *See also Pembaur v. Cincinatti*, 475 U.S. 469, 483, 106 S. Ct. 1292 (1986) ("municipal liability under 1983 attaches where — and only where — a deliberate choice to follow a course of action is made

from among various alternatives by the official or officials responsible for establishing final policy with respect to the subject matter in question"); *Daniels v. Williams*, 474 U.S. 327, 330, 106 S. Ct. 662 (1986) (mere negligence may not be enough to state a Section 1983 claim); *Parratt v Taylor*, 451 U.S. 527, 543, 101 S. Ct. 1908 (1981) (deprivation of property is a due process violation only when it occurs "as a result of some established state procedure.") And this makes sense. Unintentional, negligent acts are just that — mistaken actions or omissions, not execution of policy. They are not "deliberate," "intended," or even "desired" by the government. Such acts do not therefore classically fall into the category of serious evils that Section 1983 addresses.

The Fourth Circuit eloquently summed up this principle when it stated "[t]o hold that negligent handling of the [Covenant] application amounts to a constitutional violation by the City would only trivialize the fundamental rights the First Amendment was meant to protect." PA p. 32a.

Covenant's real objection is that the Fourth Circuit when it followed the lead of this Court and held that the better way to ferret out censorial activity in this context is through *ad hoc* review of individual cases. This approach accomplishes two important goals. *First*, dealing with abuses on an *ad hoc* basis is effective in assuring that censorship and intentional delay are sanctioned. *Thomas*, *supra*, 534 U.S. 316, 325 (2002) ("[W]e think that this abuse must be dealt with if and when a *pattern* of unlawful favoritism appears. . . ." (italic added.)) *Ad hoc* review in this type of situation thus

assures that constitutional rights will be vindicated. *Second*, the Fourth Circuit's approach follows the oft-expressed jurisprudential desire to avoid ruling on hypothetical abuses. *Id.* As related above, the Fourth Circuit specifically looked for, but found no evil motive or intent to deprive Covenant of its constitutional rights, and no facts indicating a scheme to indefinitely delay a decision. Both goals — punishing bad behavior and avoiding hypothetical abuses — are achieved by the Fourth Circuit's approach in this case.

V. THIS IS NOT AN APPROPRIATE CASE TO RECONSIDER *THOMAS*

If the Court should be inclined to reconsider or elucidate the meaning of *Thomas* and / or *FW/PBS*, this case is not the appropriate vessel.

First, the fact that Covenant was operating illegally without a business license raises the question of whether this corporate entity should be allowed to complain at all. JA pp. 153-154 (affidavit of Business License Administrator confirming that no business may operate within North Charleston without a business license and confirming that any operation by Covenant Media was illegal). Nothing in the City's sign ordinance changed the legality of Covenant's commercial sign activities, since the LLC could not legally engage in such business even if the City had no sign ordinance. *Trinity Outdoor v. Rockville* MD, 123 Fed.Appx. 101, 105 (4th Cir. 2004) (billboard company had no standing because at the time it submitted permit applications it had not complied with the requirement of a business license.)

Second, Covenant has unclean hands with respect to the delay it experienced. If Covenant had been sincerely interested in a prompt response it would have inquired with the City, even just once, about the delayed response. Instead, it sat by silently and allowed the delay to build before filing its lawsuit without warning. Similarly, had Covenant desired a prompt response after filing suit, it could have provided the City with a copy of the lost application expeditiously rather than waiting six months and then complaining about the delay. PA p. 29a. Covenant should not be heard now trumpeting the length of a delay to which it was at least an equal contributor.

Third, the delay experienced by Covenant in this case is not traceable to absence of a specified time frame in the ordinance. It would have occurred whether the ordinance contained such a provision or not. The application was lost through simple negligence. Under this circumstance, Covenant would have received no faster response even if the ordinance had listed a time limit. Given the negligent misplacement of the application, only Covenant's good faith inquiry could have shortened the time in which it received a decision. Thus, this case makes a poor candidate to announce the need for certain safeguards since the safeguard would not have changed anything on the facts of this case.

Fourth, this is a case totally devoid of any hint of censorial intent. The Fourth Circuit found the applicable portions of the ordinance to be content neutral. PA pp. 22a-23a. Moreover, the Court found that the loss was negligent, and accordingly that the delay was not the product of any intent to suppress speech. Thus, it falls squarely within the *Thomas* admonition to police abuses

as they materialize. On the facts of this case, neither abuse nor censorial intent is present.

Fifth, the delay did not prevent Covenant from posting messages of its own. The City's ordinance did not require any permit or review for the posting of a face on an existing sign structure. JA p. 206, para. 7 (Zoning Administrator averring that "[a]pplicants could, and still can, freely change message / sign copy on such signs without the necessity of seeking any City review or approval.") The delay was the *installation* of the *structure* Covenant desired to erect. No rule or law of the City would have stopped Covenant from posting any message it desired on a pre-existing structure during the time it awaited approval to construct the structure it desired.

Finally, the proposed sign was illegal from the moment the application was first presented. The proposed sign was so close to another pre-existing billboard as to violate the city's spacing rules — a ruling Covenant does not appeal. A decision rendered immediately at the counter would have been exactly the same as the decision which came three weeks after Covenant provided the City with a copy of the application.

Collectively, these points illustrate an important principle: an analysis by this Court of the decision time limit posed in the Petition would, on the facts of this case, constitute a purely hypothetical, advisory opinion with no impact "on the ground." Even if the Court were to hold that a decisional time limit is necessary, it would not change the district court's judgment about the permissibility of the structure in question because the separation violation — never seriously disputed — is independently conclusive.

There was never any chance of Covenant legally constructing its desired structure from the very first minute its representative walked into City Hall on December 1, 2004. Without a business license, undertaking a construction project in the City would have been illegal, and without proper spacing its application could never have been approved. Neither of these facts would have changed, whether the City had express decisional time limits listed or not. And neither of these conclusive facts would change if Covenant brought back the same application today.

CONCLUSION

For the foregoing reasons, the Respondent City of North Charleston respectfully requests that the Petition be denied.

Respectfully submitted,

RANDAL MORRISON
SABINE & MORRISON
TIM AMEY
P.O. Box 531518
San Diego, CA 92153-1518
(619) 234-2864

SANDRA J. SENN
STEPHANIE MCDONALD
SENN, MCDONALD
& LEINBACH
Three Wesley Drive
Charleston, SC 29407
(843) 556-4045

DERK VAN RAALTE
Counsel of Record
J. BRADY HAIR
CITY OF NORTH CHARLESTON
LEGAL DEPARTMENT
7741 Dorchester Road
Suite B
North Charleston, SC 29418
(843) 572-8700

Attorneys for Respondent